

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

VICKI L. PINERO, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

JACKSON HEWITT TAX SERVICE
INC.; JACKSON HEWITT INC.; and,
CRESCENT CITY TAX SERVICE, INC.
d/b/a JACKSON HEWITT TAX
SERVICE,

Defendants.

CASE NO.: 08-3535

SECTION R

**JUDGE
SARAH VANCE**

**MAGISTRATE JUDGE
DANIEL E. KNOWLES**

**MEMORANDUM IN SUPPORT OF DEFENDANT JACKSON HEWITT TAX
SERVICE, INC. AND JACKSON HEWITT INC.'S MOTION TO STAY DISCOVERY**

Defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (collectively “Jackson Hewitt”) hereby submit this memorandum in support of their motion to stay discovery (“Motion”) pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

Despite the rules and precedent of this Court, Plaintiff has served a veritable mountain of discovery demands¹, as to both the Defendants and third-parties, even while dispositive motions to dismiss are pending. These motions address threshold issues, and if they are decided in the Defendants’ favor discovery will be moot. The Court should stay discovery pending a resolution of those motions.

Jackson Hewitt filed its Motion to Dismiss on August 4, 2008, and co-defendant Crescent City Tax Service, Inc. (“CCTS”) filed its own Motion to Dismiss on August 11, 2008. Both

¹ Jackson Hewitt reserves all rights to object to, or seek a protective order in regard to, Plaintiff’s discovery demands on other grounds.

motions are fully briefed, and scheduled for argument on December 3, 2008. On November 18, 2008, without conferring with the Defendants pursuant to Rule 26(f), Plaintiff served Jackson Hewitt with her various demands for the production of documents, interrogatories, and deposition notices. *See* Letter of Bryan Shartle dated November 18, 2008, attached hereto as Exhibit A. A brief stay of discovery, while the Court decides the fundamental question of whether Plaintiff's Complaint is legally sufficient, is consistent with both the Federal Rules of Civil Procedure and practical concerns for judicial efficiency.

II. DISCOVERY SHOULD BE STAYED PENDING A RULING ON THE MOTIONS TO DISMISS.

It is well established that, in cases where there is a dispositive motion to dismiss pending, it is appropriate for discovery to be stayed pending resolution of that Motion. *See, e.g., Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir. 1987) (affirming a decision by a trial court to exercise its "inherent power to stay discovery until preliminary questions that may dispose of the case are determined"); *Dresser v. MEBA Med. & Benefits Plan*, No. 08-2662, 2008 U.S. Dist. LEXIS 55356 (July 10, 2008 E.D. La.) (Knowles, D.); *O'Dwyer v. United States*, No. 06-10811, 2007 U.S. Dist. LEXIS 44341 (June 19, 2007 E.D. La.) (Knowles, D.); *see also* Fed. R. Civ. P. 26(c)(1).

As this Court previously has held:

In balancing the harm produced by such a temporary stay at the outset of this case (which is nil) against the *possibility* that the motion to dismiss will be granted and entirely eliminate the need for such discovery, this Court has determined that a temporary stay is appropriate.

Dresser, supra, at *6 (emphasis in original).

The Motions to Dismiss which are pending before this Court are dispositive as to each and every Count in the Plaintiff's Complaint. Those motions address fundamental infirmities in

the Plaintiff's claim, including Plaintiff's lack of standing, failure to allege any "injury-in-fact," and, in the alternative, failure to state a claim. The motions to dismiss will obviate any need for discovery. Plaintiff cannot argue that she requires discovery to oppose the pending Motions to Dismiss, as the motions involve issues of law, and accordingly, there will be no prejudice to the Plaintiff from a stay.

In contrast, allowing discovery to go forward would unfairly prejudice Defendants. Responding to extensive and burdensome discovery requests will cause Defendants to incur significant cost and expense, and if the Court grants the Motions to Dismiss, those expenditures will have been for naught. Judicial efficiency and the balance of the equities both dictate that the Court stay discovery pending resolution of the pending Rule 12(b)(6) motions.

III. PLAINTIFF HAS DISOBEYED THE REQUIREMENTS OF RULE 26.

Not only is discovery premature, but Plaintiff has disobeyed the requirements of Rule 26 in serving her discovery demands. Plaintiff did not confer with the Defendants, as required by Rules 26(d)(1) and 26(f), prior to serving her discovery demands and interrogatories². *See* Fed. R. Civ. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . ."); Fed. R. Civ. P. 26(f)(2) ("In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling *or resolving the case*; make or arrange for the disclosures required by Rule 26(a)(1) . . . and develop a proposed discovery plan.").

It appears clear that Plaintiff is attempting to rush discovery prior to a ruling on the motions to dismiss, which could moot her entire claim. Plaintiff has neither served her initial

² Attempting to remedy one of these many defects after the fact, Plaintiff's counsel attempted to call Defendants' counsel to hold an impromptu Rule 26 conference *after* serving his discovery, without any advance notice to counsel.

disclosures under Rule 26(a), nor has Plaintiff requested that the Court hold a scheduling conference – typical steps if the Defendant merely wanted discovery to proceed in the normal course.

Attempts to rush discovery prior to a dispositive Motion to Dismiss ruling should be rejected. As this Court held in *O'Dwyer v. United States*, where “there is no stipulation or other agreement to proceed with discovery in advance of a *Rule 26(f)* conference,” where “no scheduling conference has been set by the district judge”, where “no motion for leave of court to proceed with discovery in advance of the preliminary conference was filed,” and where dispositive motions to dismiss are pending, “[t]here is no good reason to deviate from the rule which prescribes the proper timing of discovery.”³

IV. CONCLUSION

The pending motions to dismiss are based on threshold issues, which could render all discovery moot. Accordingly, the Court should issue a stay of discovery pending resolution of the motions.

³ If the Court is disinclined to stay discovery pending the rulings on the Motions to Dismiss, we respectfully request that the Court issue a finite stay pending a scheduling conference before this Court, such that a schedule which properly bifurcates discovery between class and merits issues could be agreed upon. *See, e.g.*, Fed. R. Civ. P. 23, Advisory Committee Notes for 2003 Amendments: Subdivision (c).

Respectfully submitted,

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